IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

CITY OF VANCOUVER,

Plaintiff,

v.

BRANDY L. EDWARDS,

Defendant.

Case No.: 18998V

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION

INTRODUCTION

As people continue to adopt new technologies to express their thoughts, it is important to maintain our Constitutional guarantees at the electronic frontier. While not all speech is protected by the First Amendment, the idea that courts must police every inflammatory word spoken online not only chills freedom of speech, but is inconsistent with decades of First Amendment jurisprudence. The Supreme Court has had a "longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1985) (quotations and brackets omitted)).

With these concepts in mind, this Court should protect online freedom of expression by finding RCW 9.61.260 is unconstitutional as both an infringement on the First Amendment right

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to free speech, and as a vague criminal statute, and dismiss the charges against Ms. Edwards.

STATEMENT OF FACTS

In the past Ms. Edwards and Ms. Westmont were friends. And while the entire story of their friendship and how it ended is irrelevant to this brief, it is important to note that this is a case of two former friends having a very public brawl. In September 2010, Ms. Edwards created a profile on okcupid.com, a popular online dating website, under the name Carson Westman and began a consensual series of conversations with Ms. Westmont. As part of these conversations, Ms. Westmont sent nude photos of herself to Ms. Edwards. Ms. Edwards explained to the police her intent was to reveal to the public the "real" Ms. Westmont. Months later, on March 9, 2011, long after the online relationship had ended, Ms. Edwards – under the names "Mr. W.," "Carson W.," and "Carson" – left comments on Ms. Westmont's publicly accessible blog, and offered to email Ms. Westmont's nude photo to other people. Comments submitted by Ms. Edwards on the blog included:

- "Not only is she so full of herself that she LITERALLY thinks she is the hottest piece of ass to ever exist, but she also is a complete liar and fucking nutcase"
- "When I dumped her ass, she accused me of being her ex-husband. That drama and shit only confirmed to me that I made the right choice in not pursuing a relationship with her."
- "Amanda is a fucking whack-job."

These posts were later deleted by Ms. Westmont, who reported them to the police.

A year later, Ms. Edwards was charged with two counts of violating Washington's cyberstalking law, RCW 9.61.260, which states:

> (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:
> (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;
> (b) Anonymously or repeatedly whether or not conversation occurs; or
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

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RCW 9.61.260. According to the government's response to the bill of particulars, in count one, the government's case relies on subsection (1)(b), attempting to prove that Ms. Edwards made anonymous or repeated communications to the victim for the purpose of "harassing and embarrassing" Ms. Westmont. In count two, the government appears to rely on subsection (1)(a) and the comments made by Ms. Edwards on March 9, 2011 on Ms. Westmont's public blog, in order to punish Ms. Edwards for using "indecent" language.[1]

ARGUMENT

Washington's cyberstalking statute is unconstitutional for two reasons. First, as a content-based restriction on speech, it improperly criminalizes protected expression in violation of the First Amendment. RCW 9.61.260 punishes those who speak with ill intent solely if their comments are anonymous or if they contain prohibited words; the law therefore fails to criminalize any conduct distinct and separate from the act of speaking. Moreover content-based restrictions are overbroad, as the statute's blanket prohibition on using "lewd, lascivious, indecent, or obscene" words online captures protected speech. The intent requirement fails to save the statute because criminalizing the intent to "to harass, intimidate, torment, or embarrass," combined with the act of posting anonymously or repeatedly, inevitably captures protected expression.

Second, the statute is unconstitutionally vague as it fails to inform a person what acts are criminal. The term "repeatedly" in RCW 9.61.260(1)(b) is undefined, and fails to differentiate, for instance, between separate independent events over time, or a single event with multiple acts. The statute's intent requirement is also impermissibly vague since it fails to define the terms "harass, intimidate, torment, or embarrass." Without providing any guidance as to what an objectively reasonable person would perceive as harassing, intimidating, tormenting, or embarrassing, the statute must rely on the sensibilities of each individual victim. Stalking

[1] It is clear the government is not relying on (1)(c), as none of the comments at issue concern threats to persons or property.

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statutes premised on subjective rather than objective standards have routinely been found to be unconstitutionally vague. *See Church of American Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583 (W.D. Pa. 2000); *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (Kan. 1996).

Accordingly, the case against Ms. Edwards should be dismissed.

A. The First Amendment Prohibits the Criminalization of Speech Absent Additional Conduct

At the outset, it is clear that RCW 9.61.260 is a statute that criminalizes speech and not conduct, in violation of the First Amendment. This determination is important because content-based restrictions are presumed invalid and courts must apply "more rigorous scrutiny" in reviewing them. *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S.Ct. 2705, 2724 (2010). Laws based on the content of speech must survive "strict scrutiny" and be "narrowly tailored to serve a compelling government interest." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

1. <u>The Government Cannot Criminalize the Mere Act of Speaking.</u>

The First Amendment to the Constitution prohibits the government from "abridging the freedom of speech." U.S. Const. Amend. I. Content-based restrictions of speech – laws that purely criminalize speech and not conduct – are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

For example, in *State v. LaFontaine*, 16 A.3d 1281 (Conn. App. Ct. 2011), the defendant was prosecuted under a criminal harassment statute after he angrily yelled over the telephone to his wife's attorney "if they thought they deserved respect, he would 'show [them] what respect was.'" *LaFontaine*, 16 A.3d at 1284. The court held the harassment statute, which punished the defendant solely on account of the content of his speech during the phone call, violated the First Amendment. *Id.* at 1289. In *State v. Moulton*, 991 A.2d 728 (Conn. App. Ct.), *appeal granted*,

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996 A.2d 278 (2010), the Court found that the First Amendment prevented the government for prosecuting a postal worker who commented during a phone call she might "become enraged" similarly to another postal worker who had recently gone on a killing spree. The court noted the prosecution was impermissible because the harassment statute "permitted the jury to find the defendant guilty of harassment on the basis of speech that was not given first amendment scrutiny, rather than on the basis of her conduct in making the call." *Id.* at 737.

Conversely, the First Amendment does permit the government to prohibit certain *conduct*. For example, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court considered the constitutionality of a statute that prohibited the destruction of a military draft card. *O'Brien*, 391 U.S. at 369-71. Acknowledging that the act of destroying a draft card carried symbolic meaning – opposition to the Vietnam War – the Court found that there was actual conduct at issue that the government could properly criminalize. *Id.* at 375. Specifically, the Court held the conduct at issue was destroying a government record needed by the government for the administration of the military. *Id.* at 377-78.

On the Internet, the distinction between speech and conduct is less clearly defined, but it is important that it be maintained. Here, the government attempts to punish Ms. Edwards for pure speech, which is unconstitutional.

2. <u>It Is Crucial to Maintain the Distinction Between Content and Speech Online, Because RCW 9.61.260 Criminalizes No Conduct Apart From Speaking.</u>

Washington's cyberstalking statute fails to criminalize any act apart from speaking. The reason for this has much to do with the basic nature of Internet communications.

Years ago, before the Internet, cell phones, and the convergence of the two in smartphones, a telephone in a person's house was considered "a personal or professional necessity." *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting). As a means of instant, remote communication, a person could not easily live without one, or turn it off, because it was important to have some means to communicate with others – be it to receive news

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about a sick family member, or to call 911 to report an emergency – at all times.

The telephone harassment law that Washington's cyberstalking law was modeled after reflects the technological realities of the telephone.[2] As a result, Washington courts have upheld the state's telephone harassment law from constitutional challenge because the "gravamen of the offense is the thrusting of an offensive and unwanted communication upon one who is *unable to ignore it*." *State v. Alexander*, 76 Wash. App. 830, 837-38, 888 P.2d 175, 180 (Wash. Ct. App. 1995) (emphasis added). Another Washington court has explained the telephone harassment statute is intended to "protecting the privacy of its residents' homes from the intrusion of unwanted telephone calls." *City of Everett v. Moore*, 37 Wash. App. 862, 865, 683 P.2d 617, 619 (Wash. Ct. App. 1984).

In other words, the *conduct* at issue in a telephone harassment case is a person making repeated and disruptive phone calls, resulting in an intrusion of the piercing ringing of the phone, oftentimes at late hours of the night. *See e.g., Alexander*, 76 Wash. App. at 832, 888 P.2d at 177 (affirming conviction of one defendant who made 680 "hang-up" phone calls over four days to a clinic and a second defendant who called an ex-girlfriend up to 15 times a day for several months); *State v. Dyson*, 74 Wash. App. 237, 240, 872 P.2d 1115, 1117 (Wash. Ct. App. 1994) (affirming conviction of defendant who left fifty messages threatening violence on victim's answering machine while she was screening calls to avoid the defendant).

Online communication is different. The Internet enables a person to send a message or communicate with another person. But ultimately, with respect to comments made in a public forum, like a blog, it is the recipient's choice whether to receive the communication or not. As

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[2] Washington's telephone harassment statute, RCW 9.61.230, states, in relevant part:

> (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
>
> (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues. . .

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one judge noted in dismissing a federal cyberstalking indictment on First Amendment grounds, "Twitter and Blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim." *United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011) (quoting *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), *cert. granted, opinion vacated and remanded on other grounds* 543 U.S. 1182 (2005) (quotations omitted)). And as the Supreme Court has noted, content-based restrictions on speech designed "to shield the sensibilities of listeners" are invalid because society is "expected to protect our own sensibilities simply by averting our eyes." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971) (quotations and brackets omitted)). In this case, for example, Ms. Westmont had the ability to delete the offensive comments from her blog, and in fact did so, allowing her the opportunity to effectively avert her eyes and protect her sensibilities, as well as those of other people who may be reading her blog.

That does not mean that all online communications are immune from criminal liability. States can criminalize cyberstalking by combining online communication with some sort of additional, actionable conduct. The problem with RCW 9.61.260 is that it fails to make this connection.

3. RCW 9.61.260 Criminalizes Speech and not Conduct.

Ms. Edwards is being prosecuted for two sets of communication: first, for communicating anonymously or repeatedly with Ms. Westmont over okcupid.com and email, and second for using "lewd, lascivious, indecent, or obscene words" in the anonymous comments Ms. Edwards posted on Ms. Westmont's blog. Unlike the conduct at issue in the telephone harassment statutes – the intrusion caused by a ringing phone – the cyberstalking statute here requires no intrusion and is solely concerned with speech.[3] Because the only true "act" being punished is Ms.

[3] After all, the cyberstalking statute explains that the crime could be committed not only where the communication was received, but also "at the place from which the communication

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Edwards' act of communicating, RCW 9.61.260 is an invalid content-based restriction on speech.

a. RCW 9.61.260(1)(b)'s Prohibition on Anonymous Speech Is A Content-Based Restriction on Speech.

Under RCW 9.61.260(1)(b), a speaker who posts any content, with the intent to harass, intimidate, torment, or embarrass another becomes a criminal simply by doing so anonymously. The problem with this approach is that speaking anonymously is the trigger for liability, instead of being tied to any actionable conduct, creating an "attempted anonymous harassment statute" that is unconstitutional.

The Supreme Court has noted an "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Anonymous speech is entitled to heightened constitutional protection because it is a "shield from the tyranny of the majority," particularly when considered with the First Amendment's purpose "to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." *Id.* at 357.

In addition to protecting unpopular speakers, anonymous speech facilitates a more robust marketplace of ideas. As explained famously by Justice Holmes: "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Anonymous speech enhances the ability of truth to prevail in public discourse by removing a proffered thought's associations, negative or positive, with a particular speaker. Divorced from its host, speech must be weighed

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was made." RCW 9.61.260(4). Rather than the repeated ringing of the phone waking up a person sleeping at home at a late hour of the night, cyberstalking in Washington can be committed, for example, when a person with the requisite intent sends an anonymous email from his home, regardless of "whether or not conversation occurs." RCW 9.61.260(1)(b).

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purely on its merits; this focuses and enhances debate. The longstanding principles described above have frequently been extended to apply in the context of speech transmitted over the Internet. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("It is clear that speech over the Internet is entitled to First Amendment protection. This protection extends to anonymous internet speech."). After all, "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

RCW 9.61.260(1)(b) hinders this fundamental First Amendment right to speak anonymously by criminalizing anonymous speech done with the intent to embarrass or harass, regardless of whether conversation actually occurs. Separate and apart from the fact that speech does not lose First Amendment protection merely because it is designed to embarrass or coerce others to action, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982), the statute is missing an element of actionable conduct that is required before triggering criminal liability.

For example, the First Amendment permits the criminalization of an anonymous threat to kill someone online. While such threats are not protected by the First Amendment, statutes that criminalize these types of threats connect anonymous speech with a specific form of conduct – placing the victim in fear and terror. If RCW 9.61.260 was limited similarly, combining anonymous speech with some additional act, it might pass constitutional muster.[4] But the statute as applied in this case does not do that. Instead, it combines anonymous speech with ill intent, but requires nothing else, including no requirement that the victim objectively feel fear or terror. The result is a criminal statute that can be violated by a person who sends an anonymous email intending to embarrass the recipient, although the email contains nothing embarrassing, the

[4] While this brief does not address RCW 9.61.260(1)(c), which criminalizes "[t]hreatening to inflict injury on the person or property of the person called or any member of his or her family or household," amicus notes that this provision is not sufficiently narrow to capture constitutionally unprotected "true threats," which is a "threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Virginia v. Black*, 538 U.S. 343, 360 (2003). But at a minimum, section (1)(c) is closer to passing First Amendment scrutiny than section (1)(b).

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recipient is not in fact embarrassed, or no reasonable person would find the contents of the email embarrassing. This cannot be the basis for throwing a person in jail.

Ms. Edwards' case highlights the problem. The charges in count one are based on Ms. Edwards using an alias – Carson Westman – during online conversations with Ms. Westmont. These conversations were consensual: Ms. Westmont willingly communicated with "Carson" and their communications did not contain threats of violence, or include unprotected speech like "true threats." The only *act* at issue is that of Ms. Edwards speaking with Ms. Westmont anonymously. Had Ms. Edwards used her real name, she would not be facing criminal liability. But by criminalizing the act of speaking anonymously, the statute criminalizes only speech, and nothing else. The First Amendment does not permit this.

b. RCW 9.61.260(1)(a) Solely Criminalizes The Act of Speaking Specific Words.

Count two charges a violation of RCW 9.61.260(1)(a), which criminalizes the act of simply speaking certain words. The government's theory is that Ms. Edwards used "lewd, lascivious, indecent, or obscene" language when posting comments on Ms. Westmont's blog. But again, this is nothing more than criminalizing the act of using specific words deemed to be rude or offensive. RCW 9.61.260(1)(a) has no requirement that the recipient actually receive the communication, or that a recipient be actually embarrassed or otherwise intimidated. In other words, speaking certain prohibited words with the requisite intent is enough to trigger liability, regardless of the speech's *effect*, intended or actual, on the listener.

Because RCW 9.61.260 does not require the recipient receive the communication or use a reasonable person standard in measuring speech's effect on the listener, Ms. Edward's speech only became criminal once she used an obscene word.[5] Had Ms. Edwards not used the word "fucking" when describing Ms. Westmont as a "whack-job" or "nutcase," she would not be in

[5] And as will be explained in more detail below, the word "fuck" in and of itself is not "obscene."

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violation of RCW 9.61.260(1)(a). Solely by using this one obscene word, her speech became criminal. While such obscene words are certainly coarse and vulgar, they remain a reality of modern speech. Criminal liability should not attach merely by using a word in a conversation, and such content-based restrictions on speech are "presumptively invalid." *R.A.V.*, 505 U.S. at 382.

B. RCW 9.61.260 Is Overbroad By Criminalizing Protected Speech Under The First Amendment

The First Amendment does allow restrictions on speech that is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). That includes obscenity, defamation, fighting words, and true threats. *See generally Black*, 538 U.S. at 359-60; *R.A.V.*, 505 U.S. at 382-83. But statutes, particularly those regulating speech on the Internet, must be narrowly drafted to avoid capturing protected speech. RCW 9.61.260 is anything but narrow.

1. RCW 9.61.260(1)(a)'s prohibition on the use of "lewd, lascivious, indecent, or obscene" words captures protected speech.

RCW 9.61.260(1)(a) operates as a blanket prohibition on the use of "lewd, lascivious, indecent, or obscene" language when communicated on the Internet. This is broader than what is permitted under the First Amendment as the "fact that society may find speech offensive is not a sufficient reason for suppressing it." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745 (1978). In determining what words can and cannot be said, it is not just the content, but the *context* that matters. Three Supreme Court cases involving the use of the obscene word "fuck" highlight this. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court reversed the conviction of a defendant who wore a jacket in public that said "fuck the draft." *Cohen*, 403 U.S. at 16. Acknowledging that states had a right to prohibit "obscene expression," the Supreme Court

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nonetheless noted that "such expression must be, in some significant way, erotic." *Cohen*, 403 U.S. at 20 (quoting *Roth v. United States*, 354 U.S. 476 (1957)). Clearly the obscene word at issue in *Cohen* was not used in an erotic way, but rather as a way to emphasize the defendant's political beliefs.

Similarly, in *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam), the Supreme Court reversed a conviction based on an antiwar protester telling a crowd "we'll take the fucking street later" as unconstitutional. *Hess*, 414 U.S. at 107. The Supreme Court found the state's disorderly conduct statute was being applied in a way "to punish only spoken words." *Id.* Examining the context of the speech, the court found the speech was not directed to any individuals, did not implicate any privacy interests, and did not have a tendency to lead to imminent violence. *Id.* at 107-09. And, like *Cohen*, the speech was not erotic.

Conversely, in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) a radio station was cited for publicly broadcasting George Carlin's "Dirty Words," which included obscene words describing "sexual and excretory activities in a patently offensive manner." *F.C.C.*, 438 U.S. at 732, 752-55. The Supreme Court affirmed the F.C.C.'s decisions, but noted obscene words "are not entirely outside the protection of the First Amendment" and citing *Cohen* and *Hess*, noted that "some uses of even the most offensive words are unquestionably protected." *Id.* at 746-47. Crucially, whether speech has "social value" depends on the circumstances. *Id.* at 747 (quoting *Chaplinsky*, 315 U.S. at 572).

RCW 9.61.260 fails to contextualize the speech it attempts to restrict, and instead creates a blanket prohibition on the use of obscene words online, regardless of the context of the speech or whether it was directed to someone directly. A statute this broad is unconstitutional. While words deemed "obscene" are certainly coarse, they nonetheless are legitimate protected speech in certain contexts. *F.C.C.*, 438 U.S. at 746-47.

Ms. Edwards' use of "obscene" language here was protected as it certainly was not used in erotic circumstances. In other words, it was less like the speech at issue in *F.C.C.* and more

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like the speech at issue in *Cohen* and *Hess*: an obscene word used in a non-erotic manner to draw emphasis to one's beliefs. While calling Ms. Westmont a "fucking whack-job" and "fucking nutcase" was certainly rude, the obscene word emphasized Ms. Edwards' negative opinion of Ms. Westmont in a non-erotic manner. This type of speech may be coarse and vulgar, but it is nonetheless protected by the First Amendment.

While the government may attempt to argue that the statute's intent requirement narrows the context of the statute, the intent requirement itself also captures protected content.

2. The Intent Requirement, When Coupled With The Act Of Speaking Anonymously, Captures Constitutionally Protected Forms of Expression.

RCW 9.61.260 punishes a speaker who speaks anonymously with the intent to "to harass, intimidate, torment, or embarrass." Similar language in a harassment ordinance has already been found to be overbroad. In *Church of American Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583 (W.D. Pa. 2000), the court reviewed an ordinance that prohibited the wearing of a mask in public with the intent to "intimidate, threaten, abuse or harass." *Ku Klux Klan*, 99 F. Supp. 2d at 586. The ordinance, however, did not define what these terms meant, and the court found that the statute ran afoul of the First Amendment on vagueness grounds. *Id.* at 592. Looking to the ordinary dictionary definitions of the undefined words "intimidate, threaten, abuse or harass," the court found that the terms could "be understood as encompassing forms of expression that are constitutionally protected." *Id.* The court noted statements advocating white supremacy or a return to segregation may be intimidating or threatening, but are nonetheless "constitutionally protected, albeit unpopular and offensive." *Id.*

The same terms that captured constitutionally protected speech in *Ku Klux Klan* are used in RCW 9.61.260. But perhaps even more problematic, the statute here also encompasses the intent to "embarrass." The term "embarrass" is exceedingly broad: Webster's Collegiate Dictionary defines the term as "to place in doubt, perplexity, or difficulties" as well as "to cause to experience a state of self-conscious distress." *See* Merriam-Webster's Collegiate Dictionary,

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Eleventh Edition, 2008.[6] This expansive definition can cover an enormous amount of protected speech. Moreover, the Supreme Court has noted that speech "does not lose its protected character, however, simply because it may *embarrass* others." *Claiborne Hardware Co.*, 458 U.S. at 910 (emphasis added). For example, under RCW 9.61.260, a journalist may be guilty of cyberstalking for anonymously publishing a story revealing the infidelity of a political candidate with the intent to embarrass or humiliate him.

The statute runs afoul of the First Amendment in not only Ms. Edwards' case but in its application generally. For example, speech on Twitter[7] could be criminalized under RCW 9.61.260. If a mother, using a Twitter handle with a pseudonym rather than her real name, proceeds to tweet an embarrassing story about her son spilling milk on the carpet, she has violated the law. After all, RCW 9.61.260 has no requirement that the intended recipient of the communication actually receive it, or that the communication *actually* be embarrassing or offensive to a reasonable person. Injurious intent coupled with anonymous speech is all that is required under the statute. And that clearly covers a wide amount of protected speech, including a whistleblower exposing the wrongdoings of their supervisor or employer with "embarrassing" information about business practices, or even a commenter posting a negative review of a restaurant on a website like Yelp.[8]

The breadth of the statute makes even Ms. Westmont herself a potential criminal

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[6] Accessible at http://www.merriam-webster.com/dictionary/embarrass (last visited July 23, 2012).

[7] Twitter (www.twitter.com) is a social networking website that allows each user to create a unique profile and publish messages onto their Twitter page, or "feed." Twitter messages published on a user's feed are called "tweets," and can be no more than 140 characters in length. Tweets are displayed on a user's feed in reverse chronological order, with the most recent tweet appearing first. One Twitter user can "follow" (or subscribe) to another user's feed to read that person's tweets. Twitter allows users to create a "handle" or name for their Twitter account. It also allows them an opportunity to provide their real name if they want.

[8] Yelp (www.yelp.com) is a website that allows users to post reviews of restaurants and other businesses by assigning one to four stars.

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defendant. In a July 26, 2011 post on her blog titled "Was Your Marriage Abusive," Ms. Westmont writes about her divorce from her ex-husband, using an "indecent" word ("shit") while describing details of her sex life, and including comments like "my marriage was also sexually abusive," "Dave doled out sex to me in tiny bite-sized portions, designed to illustrate how he was in control," and "Dave never even kissed me during sex. I was his wife and he used me."[9] This blog post could be a violation RCW 9.61.260(1)(a), as it constitutes an electronic communication to a third party, containing "indecent" language, potentially made with the intent to embarrass Ms. Westmont's ex-husband.

This is not intended as a personal attack on the victim, only an example of how constitutionally problematic this statute is, in that most bloggers purporting to discuss personal matters in their lives – including the alleged victim here – could run afoul of RCW 9.61.260. These types of otherwise legitimate activities cannot be the basis of criminal liability. To the extent RCW 9.61.260 leaves that possibility open, it is unconstitutional.

C. RCW 9.61.260 Is Unconstitutionally Vague

A statute is "impermissibly vague" if it "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). The statute fails to provide adequate notice to a person as to what is and is not criminal by not explaining what "repeatedly" means, and by hinging criminal liability on the individual sensibilities of the listener.

1. <u>The Undefined Term "Repeatedly" In RCW 9.61.260(1)(a) Is Unconstitutionally Vague.</u>

Armed with the requisite intent, it is a violation of RCW 9.61.260(1)(b) to "repeatedly" communicate with someone online. But the statute is silent as to what "repeatedly" means.

[9] *See* http://www.mandajuice.com/mandajuice/2011/07/was-your-marriage-abusive.html (last accessed July 18, 2012).

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On the basis of the potential confusion in the word "repeatedly," the Massachusetts Supreme Judicial Court found in *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994), that a statute that requires a defendant "repeatedly" harass another person was unconstitutionally vague since it could be interpreted to require a repetition of a pattern over a period of time, or a single pattern or series of acts. *Kwiatkowski*, 637 N.E.2d at 857.

The same is true here. Does RCW 9.61.260 require separate independent events over time, such as sending a number of emails over several days? Or does it mean a single event with multiple acts occurring, such as one encounter during an instant messaging application where a back and forth conversation ensues? Without any definition in the statute, a person is left guessing as to what acts are criminal, a clear sign that a statute is vague.

2. The Intent Requirement in RCW 9.61.260 is Vague Because It Relies On the Subjective Sensibilities of the Listener.

RCW 9.61.260's requirement that a speaker act with the intent to "to harass, intimidate, torment, or embarrass" is unconstitutionally vague because it fails to include a clear and objective definition of what these terms mean. And in the absence of any definition, courts have not hesitated to find similar "harassment" statutes unconstitutional.

For example, in *Ku Klux Klan*, in addition to striking down the ordinance that criminalizes wearing a mask in public with the intent to "intimidate, threaten, abuse or harass" as overbroad, the court also invalidated it as vague. *Ku Klux Klan*, 99 F. Supp. 2d at 592. Since the ordinance did not define the words "intimidate," "threaten," "abuse," or "harass," inadequate notice was given to the speaker as to what speech was and was not permitted. *Id.* The court noted that the "speaker's liability is potentially defined by the reaction or sensibilities of the listener." *Id.* That was problematic because "what is 'intimidating or threatening' to one person may not be to another" and even though the ordinance had a scienter requirement, "the intent could be inferred from circumstantial factors, which may include the effect that particular speech has on the speaker's audience." *Id.*

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Similarly, in *State v. Bryan*, 910 P.2d 212 (Kan. 1996), a Kansas court found a harassment statute imposed criminal penalties when a person "seriously alarms, annoys or harasses" another person, unconstitutionally vague since it relies on the subjective sensibilities of the listener. *Bryan*, 910 P.2d at 220.[10] It noted that without any objective standards or guidance, "the terms 'annoys,' 'alarms' and 'harasses' subject the defendant to the particular sensibilities of the individual victim," and because "[d]ifferent persons have different sensibilities" a "victim may be of such a state of mind that conduct which would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass *this* victim." *Id.* (emphasis added).

Washington's cyberstalking statute has the same problem as the statutes in *Ku Klux Klan* and *Bryan*. By not defining the terms "harass, intimidate, torment, or embarrass," the statute relies heavily on the individual sensibilities of the listener. A speaker has no way of knowing what speech can get her into trouble with the law, particularly considering that RCW 9.61.260 concerns speech not only targeted to a specific person, but also speech made to a third party, as will often be the case with Internet communication. It is thus vague, and unconstitutional.

CONCLUSION

Because RCW 9.61.260 is a content-based restriction on speech, criminalizes protected speech, and is vague, it is unconstitutional as currently written. As a result, the case against Ms. Edwards must be dismissed.

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[10] Statutes criminalizing the act of "annoying" someone have consistently been found to be unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), *City of Everett v. Moore*, 37 Wash. App. 862, 866-67, 683 P.2d 617, 619-20 (Wash. Ct. App. 1984); *see also Bryan*, 910 P.2d at 217 (citing cases). And as noted in *Ku Klux Klan*, "harass" is defined as "to annoy persistently." *Ku Klux Klan*, 99 F.2d at 592 n. 7; Merriam-Webster's Collegiate Dictionary, Eleventh Edition, 2008 (accessible at http://www.merriam-webster.com/dictionary/harass (last visited July 23, 2012)).

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CERTIFICATE OF SERVICE

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